2005

State of Utah v. Jeffrey Houston : Reply Brief

Utah Court of Appeals

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2005-0535-CA

UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff and Appellee,

vs.

JEFFREY HOUSTON,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

Appeal from the Final Judgment and Conviction of the
Seventh Judicial District Court, Emery County
State of Utah, by the Honorable Bryce K. Bryner

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ORAL ARGUMENTS & PUBLISHED OPINION NEEDED

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TABLE OF CONTENTS.

TABLE OF AUTHORITIES.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff and Appellee, **vs.** JEFFREY HOUSTON, Defendant and Appellant.	**REPLY BRIEF OF APPELLANT** Case No. 20050535-CA

ARGUMENTS.

POINT III (CONTINUED).

THE STATE IMPERMISSIBLY REQUEST THIS COURT TO PRESUME REGULARITIES IN THE PROCEEDINGS; IN STEAD OF INDULGING THE PRESUMPTION OF NO WAIVER OF A CONSTITUTIONAL RIGHT AND REQUIRING THE STATE TO REBUT THE PRESUMPTION THROUGH SUPPLEMENTATION OF THE RECORD, AS REQUIRED BY THE COURTS.

In this matter, the record reflects that Mr. Houston was indigent. R. at 344-348. That finding was made on January 28, 2005, apparently following Defendant's conviction of thirteen counts of Precursor violations all second degree felonies. The finding of the court prior to trial on January 26, 2005 was that the request was untimely claiming that Mr. Houston had ample

opportunity to retain counsel. T-1, at 8. However, as the record also reflects Mr. Houston did have counsel for near two years – Margret Taylor, but for her ineffective assistance of counsel prior to trial, he would have ~~bee~~ been represented by an attorney at the time of trial. R. at 280. The court inappropriately attributed Ms. Taylor's failures and delay upon Mr. Houston and permitted her withdrawal simply alleging the appearance of a conflict. Its bad enough that counsel inappropriately waived Mr. Houston's right to a preliminary hearing without his consent or knowledge but its quite another that her personal agenda to legalize drugs actually resulted in additional charges against him being applied in the State's two amended Informations. See, i.e., R. at 76, 80, 83 233, 235, 242, 258 & 261.

The matter before the Court as characterized by the State is that Mr. Houston abandoned or otherwise waived his right to counsel. Appellee's Br. pp. 10-20. In its arguments that State allegations are two-fold. One, the State claims that the presumption is one of regularity rather than the presumption against a waiver of a fundamental constitutional right as argued by Houston. Appellee's Br. p. 15; Aplt's Br. pp. 33-37. The next contention raised by the State is that Houston abandoned his right to counsel by conduct, but there is an inadequate record to prove it. Appellee's Br. pp. 12-16. This reply brief is submitted to address both propositions.

A. Defendant Houston Did Not Waive His Right To Counsel and It is The State's Burden To Prove That a Waiver Did Occur.

In reviewing the issues before this Court is it important to consider what aspects did not occur, to wit: Whether Mr. Houston requested to represent himself; whether he was offered choices; or whether Mr. Houston refused assistance of counsel?

I. Self-Representation Request and Assistance of Counsel Presumption.

The Utah Supreme Court reviewed, the right of self-representation in State v. Bakalov, 979 P.2d 799 (Utah 1999). In that matter, the Supreme Court required that record must show that the defendant's "'clearly and unequivocally'" requested it. Id., at 808 (*citing* United States v. McKinley, 58 F.3d 1475, 1480 (10th Cir. 1995) (*quoting* United States v. Reddeck, 22 F.3d 1504, 1510 (10th Cir. 1994)). The requirement that a defendant make an explicit request ensures that the defendant will not unthinkingly waive the right to counsel through sporadic musings or, on appeal, mischaracterize statements he made in the trial court and claim that he was denied the benefit of counsel if he proceeded pro se, or that he was denied the right to self-representation if he was represented by counsel. *See* Adams v. Carroll, 875 F.2d 1441, 1444 (9th Cir. 1989). If a defendant equivocates in his request to represent himself, he is presumed to have requested the assistance of counsel. *See* Johnson v. Zerbst, 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938). A defendant's assertion of the right of self-representation must be voluntary, the product of a free and meaningful choice. *See* State v. Frampton, 737 P.2d 183, 187 (Utah 1987).

In this matter, it is clear by the record that Mr. Houston did not request to represent himself. Early on, on January 7, 2003, Mr. Houston requested to hire private counsel. R. at 3; Appellee's Br. at "Add. B." It is equally clear that he did not refuse the assistance of counsel either. T-1, at 8; Aplt's Br. p. 14. Before trial commenced, the Court addressed the circumstances surrounding Houston's request for counsel be appointed and the timeliness of Houston's filing of an *Affidavit of Indigency*. T-1, at 8-11.

Having concluded Mr. Houston had not timely requested his right to representation, the Court however said nothing to protect Houston through honoring the presumption that Mr.

Houston was otherwise entitled to the assistance of counsel nonetheless. *See* Johnson v. Zerbst, 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938). Even though the findings of the Court were one of untimeliness, the findings were clearly erroneous. Under the circumstances, Houston's conduct was "excusable neglect" addressed below.

II. Defendant's Choices Concerning Representation/Self-Representation.

In this matter, the Court failed to offer Houston any substantial choices either. A defendant cannot be forced to proceed with incompetent counsel or counsel having a conflict of interests: "[A] choice between proceeding with incompetent counsel or no counsel is in essence no choice at all." Wilks v. Israel, 627 F.2d 32, 36 (7th Cir. 1980). Requiring a defendant to choose between self-representation and some other course of action does not always enable a defendant to make a totally voluntary decision. "If a choice presented to a petitioner is constitutionally offensive, then the choice cannot be voluntary." Id. However, if the defendant's options are constitutionally sound, the choice between alternatives is voluntary. See id. In this case, Mr. Houston was not given the choice of private counsel or public defender. The only time that offer was made was at the outset, on January 7, 2003. R. at 3; Appellee's Br. "Add. B." After Houston hired private counsel, Margret Taylor, Houston received ineffective assistance as counsel as described in Houston's opening brief at pages 5-12. In June 2003, Ms. Taylor filed a motion to dismiss arguing her own agenda seeking to legalize drugs. R. at 56. Ms. Taylor waived without consulting Mr. Houston his right to a preliminary hearing, of which Mr. Houston denies agreeing to waive. R. at 146; T-1, at 8. Ms. Taylor missed a motion to suppress filing deadline causing Houston to lose another opportunity to weigh the State's evidence. R. at 233,

237. Ms. Taylor then filed a motion to sever the seventeen counts asserting prejudice at trial only to then withdraw the motion without a judicial opinion. R. at 240, 242, 255, 265. Subsequently at the day of a cancelled trial where a change of plea had been hoped for, Ms. Taylor motioned for a withdrawal as counsel and was granted the motion, on the grounds "there appears to be a conflict between the defendant and his counsel." R. at 180. The decision of the Court was constitutionally offensive and prejudicial, and is not adequately supported by proper findings including concerning the nature of conflict, desire of the defendant, inability of counsel as an officer of the court to rise about the conflict, alternative assistance of counsel, availability of a substitution, etc.

In summation, the State cannot meet its burden to show that Houston had a voluntary choice in the loss of his counsel, Margret Taylor. The decision to release Ms. Taylor is unequivocally the choice of counsel and was permitted by the Court without additional warning to the defendant or any information elucidating other options.

III. No Abandonment by Intent or Implied by Alleged Conduct.

The two issues above are not disputed between the parties. The disputed issue presented by the State in it's responsive brief is whether Mr. Houston waived his right to counsel through his conduct. Appellee's Br. pp. 16-20. The State contends that Mr. Houston waived his right to counsel by his conduct. The record states, "[A]fter Ms. Margret Taylor's services were terminated on November 18, 2004, the court ordered defendant to appear before the court on several occasions and advise the court on his progress in hiring counsel." R. at 526. The Court continued, "Each time the court admonished . . . the importance of employing counsel but

defendant procrastinated the hiring of counsel even though he was working in the coal mines." Id. The State, in its responsive brief, at page 19, argues, "These statements suggest that the court properly warned defendant of the dangers and disadvantages of self-representation . . . . Defendant has not presented a record upon which this Court can review his claim that the trial court failed to adequately warning (sic) him of the dangers and disadvantages of self-representation." Appellee Br. p. 19. From this remark, the State urges this Court to adopt the belief this Court must "assume that the trial court adequately warned defendant of the consequences of dangers and disadvantages of self-representation and that his waiver was knowing and intelligent." Appellee's Br. p. 20. The argument of the State is belied by the court record.

The record fails to identify any kind of colloquy and the State failed to attempt to a supplementation of the record if it thought such a colloquy existed. See, e.g., State v. Frampton, 737 P.2d 183, 188 (Utah 1987) (example of colloquy). The fact is the court's minutes failed to suggest where a colloquy might of even occurred. In Frampton, the Supreme Court directed the following or similar instructions were necessary:

> (a) Have you ever studied law?
> (b) Have you ever represented yourself or any other defendant in a criminal action?
> (c) You realize, do you not, that you are charged with these crimes: (Here state the crimes with which the defendant is charged.)
> (d) You realize, do you not, that if you are found guilty of the crime charged in Count I, the court ... could sentence you to as much as _____ years in prison and fine you as much as $_____? (Then ask him a similar question with respect to each other crime with which he may be charged in the indictment or information.)
> (e) You realize, do you not, that if you are found guilty of more than one of those crimes this court can order that the sentences be served consecutively, that is, one after another?
> (f) You realize, do you not, that if you represent yourself, you are on your own? I cannot tell you how you should try your case or even advise you as to how to try your case.

(g) Are you familiar with the ... Rules of Evidence?

(h) You realize, do you not, that the ... Rules of Evidence govern what evidence may or may not be introduced at trial and, in representing yourself, you must abide by those rules?

(i) Are you familiar with the ... Rules of Criminal Procedure?

(j) You realize, do you not, that those rules govern the way in which a criminal action is tried in ... court?

(k) You realize, do you not, that if you decide to take the witness stand, you must present your testimony by asking questions of yourself? You cannot just take the stand and tell your story. You must proceed question by question through your testimony.

(l) (Then say to the defendant something to this effect): I must advise you that in my opinion you would be far better defended by a trained lawyer than you can be by yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the Rules of Evidence. I would strongly urge you not to try to represent yourself.

(m) Now, in light of the penalty that you might suffer if you are found guilty and in light of all the difficulties of representing yourself, is it still your desire to represent yourself and to give up your right to be represented by a lawyer?

(n) Is your decision entirely voluntary on your part?

(o) If the answers to the two preceding questions are in the affirmative, you should then say something to the following effect: "I find that the defendant has knowingly and voluntarily waived his right to counsel. I will therefore permit him to represent himself."

(p) You should consider the appointment of standby counsel to assist the defendant and to replace him if the court should determine during trial that the defendant can no longer be permitted to represent himself.

Id., at 188. No where in the record for the dates of January 7, 2003, November 18, 2004, December 7, 2004, January 4, 2005, and January 19, 2005 does the record suggest a colloquy. At no point was it the intentions of Mr. Houston to represent himself. At all stages Mr. Houston wanted to be represented by counsel. Instead, the Court on January 26, 2005, required Mr. Houston on the morning of his trial to represent himself. In response, the defendant requested a continuance. T-1, 17-18.

The State's contentions without citation to the record that Mr. Houston was warned, repeatedly to obtain counsel, or else he was lose his right to counsel is inappropriate. No such admonishment from the bench occurred. "Courts should indulge every reasonable presumption

against waiver of fundamental constitutional rights." State v. Meinhart, 617 P.2d 355, 357 (Utah 1990) (quoting from Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). "When human life is at stake, it is the duty of the court to interfere ad see that the defendant is not deprived of a fair trial . . . . A conviction contrary to the weight of the evidence will be set aside." People of the Territory of Utah v. Thiede, 11 Utah 241, 39 P. 837 (1895) (citations omitted). In this matter, the overwhelming weight of the evidence presented in the record casts serious doubt that the trial Mr. Houston was afforded was fair, including the assistance of counsel.

The trial was unfair to Defendant. It is well settled without a need to provide citation. The burden of proof in a criminal trial is proof beyond reasonable doubt. The trial in this matter without the assistance of counsel resulted in a conviction upon "uncorroborated hearsay." The Supreme Court of the United States, in Richardson v. Perales, 402 U.S. 389, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971), has held that "Mere uncorroborated hearsay or rumor does not constitute substantial evidence." "Substantial evidence" is a far lower burden of proof. The Supreme Court defined "substantial evidence" as meaning "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id., at 401. The testimony of Jennifer McNair was uncorroborated hearsay as to the work performed by Kevin Smith, a Senior Criminalist at the State Crime Lab, and the testimony of clandestine labs and the conduct of others was all pure rumor. T-1, 43-45. At trial, McNair admitted the work was performed by Kevin Smith and she affirmatively testified that she did not test the substance limiting herself to a review of Smith's materials only. T-1, 45. Having either representation at the time of trial, or even the assistance of counsel at trial, a law-trained attorney

competent in the profession, would have avoided the admission of such uncorroborated hearsay and rumors which are absolutely inadmissible in a criminal trial. The only way the lab results would be corroborated is if the testifying expert had tested the contraband herself. Admittedly, that did not occur. T-1, at 45.

Here in this matter, the State contends that the presumption of regularity is the standard and suggests that the record was inadequate for this Court to consider the issue of Mr. Houston's claim for right of counsel. That presumption of regularity, generally is the norm. However, given the fact that the right to counsel at trial is a fundamental right. The presumption is against a waiver as noted in State v. Meinhart, 617 P.2d 355 (Utah 1980) and Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed 1461 (1938). The request by the State to assume regularity in the district court proceedings is impermissible concerning the waiver of constitutional rights. The State bears a strict burden of showing an alleged waiver of a constitutional right, including the right to counsel at trial. Schneckloth v. Bustamonte, 412 U.S. 218, 241, 93 S. Ct. 2041, 2055, 36 L. Ed. 2d 854 (1973). The strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial. Id., at 241; see also, State v. Bolsinger, 699 P.2d 1214, 1222 (Utah 1985). In light of the State's strict burden imposed by Bustamonte and Bolsinger, the proper course of action the State should have taken if it truly believed the record was inadequate was to seek a supplementation of the record in order to demonstrate a waiver occurred. Even the findings of the judge on the day of trial contradicts the State's assertion, however. The right to have the assistance of counsel in a criminal trial is a fundamental constitutional right which must be jealously protected by the trial

court. State v. Heaton, 958 P.2d 911 (Utah 1998). The day of trial, the judge made findings, its findings failed to reveal a colloquy. Moreover, the findings failed to properly state facts which could leave a reasonable jurist to believe a waiver occurred. In stead, the findings admittedly only attempted to justify the court's desire to find that the affidavit of indigency was untimely. Even that conclusion was not properly adduced by the Court. If an accused is indigent, he is entitled to court-appointed counsel. See State v. Wulffenstein, 733 P.2d 120, 121 (Utah 1986). Timing has little to do with it.

Given the fact that no waiver or abandonment occurred, this Court should reverse and remand. In order to find that an abandonment occurred, the State has the strict burden to demonstrate a waiver. In the alternative, the State would be required to seek supplementation of the record to reveal rebuttal evidence to a defendants affirmative statements that the right had been denied. The State's suggestion of handling the appeal by drawing inferences from a presumption of regularity is not the established approach. The proper means to handle the issue is to presume a violation of a constitutional right and permit the State to rebut the presumption. Barnard v. Wasserman, 855 P.2d 243, 247 (Utah 1993) (although courts indulge a presumption against waiver of constitutional rights, the presumption is rebuttable); Pitts v. Board of Educ., 869 F.2d 555, 557 (10th Cir. 1989). Waiver is deemed to occur when the totality of the circumstances indicates an intentional abandonment or relinquishment of a known constitutional right. Edwards v. Arizona, 451 U.S. 477, 482, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981); Johnson v. Zerbst, 304 U.S. 458, 464, 82 L. Ed. 1461 , 58 S. Ct. 1019 (1938); Pitts, 869 F.2d at 557. And that Powell v. State of Alabama, 287 U.S. 45, 53 S. Ct. 55, 64, 77 L. Ed. 158, holds to constitute due process of law in his trial the defendant "requires the guiding hand of counsel at

every step in the proceedings against him," unless he intelligently and understandingly waives counsel. Because the determination that a defendant has intelligently waived his right to counsel "turns 'upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused,'" id., at 732 (quoting Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938)), the constitutionality of an accused's waiver of the right to counsel is a mixed question involving both fact and law. See State v. Tenney, 913 P.2d 750, 753 (Utah App. 1996). In this matter, there is no showing of a intentional and knowing abandonment. Quite to the contrary, Houston sought a finding of indigency as requested of him by the Court through the submission of an affidavit. R. at 344-346. The fact that it was deficient should be evidence alone of Mr. Houston's inability to effectively represent himself. T-1, at 11. The only question before this Court is whether Mr. Houston made a good faith attempt to secure new counsel or whether he knowingly and intentionally by acting dilatory knowingly and intentionally abandoned his right to counsel. Mr. Houston denies that he acted dilatory. He also denies abandoning his right to counsel. If this Court wants to find that Mr. Houston neglected to obtain counsel timely, the Court should also find under the totality of the circumstances the neglect was excusable, as so should have the trial judge.

B. Under the Totality of the Circumstances, Excusable Neglect Exists Even if the State Rebuts the Presumption.

Excusable neglect has been approved as "good cause." Clearly the facts occurring before the trial judge the days leading into trial stated above constitute "good cause." The failure to timely service is without dispute "neglect." The pivotal question then for the Court to decide is

whether the explanation provided under all the circumstances is "excusable" even if the State were able to rebut the State's initial presumption.

The Supreme Court of the United States has noted that "excusable neglect" is a "somewhat elastic concept," not limited exclusively to omissions caused by circumstances outside the moving party's control, but which must be assessed in view of all relevant circumstances surrounding the omission. Pioneer Inv. Servcs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 390-95, 113 S. Ct. 1489, 1496-98, 123 L. Ed. 2d 74 (1993) (construing excusable neglect in context of Bankruptcy Rule 9006(b), which was patterned after Rule 6(b)).

POINT IV.

THE STATE'S RELIANCE ON PEDOCKIE IS SUPPORTIVE OF HOUSTON; HOWEVER, THE STATE MISCONSTRUES THE CASE AGAINST HOUSTON.

In this matter, the State relies on Pedockie, 2006 UT 28, ¶33 (Utah Supreme Court, May 12, 2006); that reliance is misplaced and is apparently misrepresented. The State argues, "An implied waiver, like a true waiver, in addition to being voluntary, must also be 'knowing and intelligent.' *Pedockie*, 2006 UT 28, ¶ 33 (citing *Goldberg*, 67 F.3d at 1102). In other words, in addition to knowing the consequences of continued misconduct, the defendant must 'possess[] an awareness of the dangers and disadvantages of self-representation at the time of the implied waiver.' *Id.* '[T]the trial court must ensure that the defendant is cognizant of the dangers and disadvantages of self-representation' and that his waiver is therefore knowing and intelligent. *Id.* at ¶ 38." A review of Pedockie, Attachment "A," demonstrate it is clearly supporting of Mr. Houston's contentions. On certiorari, the Utah Supreme Court held that Pedockie voluntarily

waived his right to counsel through his dilatory conduct. It nevertheless, reversed his conviction, holding that the waiver was not knowing and intelligent. The Supreme Court then affirmed the reversal of the conviction, but on different grounds. The Court stated, "Like the court of appeals, we recognize that an accused may voluntarily waive his right to counsel through his conduct. But we find no such voluntary waiver in this case." Pedockie's conduct more egregious than suggested about Houston, if the Courts could not agree with the district court that a waiver of counsel occurred there, this Court should not find that such a waiver was the result here. Just as in this case, the Court of Appeals, this Court, stated that it need not decide the question of "knowing and intelligent" because there was "nothing in the record to persuade [it] that [Pedockie's] waiver was knowing and intelligent." Inasmuch as the issues and the likely outcomes between this appeal and Pedockie, the State should have agreed to remand this matter as the controlling case law is adverse to the State's position.

MOTION FOR FRIVOLOUS FINDINGS.

Consequently, this Court should find that the State's defense on appeal is without merit and is therefore frivolous. With a finding of a frivolous defense on appeal, Houston requests an award of damages, the recovery of attorney's fees and the award of costs pursuant to both Rule 33 & 34 of the Utah Rules of Appellate Procedures. Upon request of the Court, a memorandum of costs and an affidavit of attorney's fees shall be provided.

CONCLUSION.

Based upon the foregoing, Mr. Houston requests this court to vacate the Defendant's conviction for loss of jurisdiction in the course of the proceedings for not providing a complete court – as the Sixth Amendment the court cannot deprive the accused of counsel at trial. Also, the defendant was deprived effective assistance of counsel during his near two year pretrial proceedings. It was error for the defendant's counsel to be permitted to withdraw two months before trial without cause particularly since her conduct had prejudiced the defendant and her reign of representations lasted for nearly two years, resulting in the loss of suppression issues, the failure to sever prejudicial claims, repeated continuances, the lack of preparation for trial, no witnesses being called for his defense, and the apparent waiver of a preliminary hearing. Meanwhile, it is obvious that the arresting officer and agents of the State had zero probable cause to arrest Mr. Houston and to seize his lawfully purchased crystal iodine. At the time of arrest, Det. Funk knew from Mr. Houston and the Emery Animal Clinic both that Houston was a farrier and that he had a history of purchasing iodine crystals and iodine solution both from the clinic, and that he had acquired the general reputation as being a farrier according to employees of the clinic. Then following the arrest, during the interview, the agents and officers exploited Mr. Houston and his circumstances by forcing an appearing consensual confession, when "but for" the false arrest and the false representations of leniency by a lawyer made in light of Miranda, the confession never would have been obtained.

Because the State's defense to Houston's appeal is frivolous in light of State v. Pedockie, 2006 UT 28 (Supreme Court, May 12, 2006), damages, reimbursement of attorney's fees, and costs should be provided pursuant to Utah Rules of Appellate Procedure.

RESPECTFULLY SUBMITTED this 21st day of June, 2006.

D. BRUCE OLIVER, L.L.C.

D. BRUCE OLIVER
Attorney for Appellant and Defendant

CERTIFICATE OF MAILING

I, D. Bruce Oliver, hereby certify that on this 21st day of June, 2006, I served a copy of the foregoing **REPLY BRIEF OF APPELLANT** upon the counsel for the Appellee in this matter, by mailing it to the State of Utah by first class mail with sufficient postage prepaid to the following address: Jeanne B. Inouye, Mark L. Shurtleff, Office of the Attorney General, P.O. Box 140856, Salt Lake City, Utah 84114-0856.

D. BRUCE OLIVER

ADDENDUM "A"

2006 UT 28

This opinion is subject to revision before final publication in the Pacific Reporter.

IN THE SUPREME COURT OF THE STATE OF UTAH

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State of Utah,
Plaintiff and Petitioner,

v.

Robert Brian Pedockie,
Defendant and Respondent.

No. 20040746

F I L E D

May 12, 2006

Second District, Ogden Dep't
The Honorable Ernest W. Jones
No. 011900689

Attorneys: Mark L. Shurtleff, Att'y Gen., Kris C. Leonard, Asst. Att'y Gen., Salt Lake City, for plaintiff
Sharon L. Preston, Salt Lake City, for defendant

On Certiorari to the Utah Court of Appeals

PARRISH, Justice:

¶1 Defendant Robert Brian Pedockie was charged with aggravated kidnapping, a first degree felony. During pretrial proceedings, Pedockie was represented by a string of various public defenders and private attorneys, all of whom either withdrew or were fired. Despite Pedockie's invocation of his Sixth Amendment right to counsel, the trial court allowed the trial to proceed with Pedockie representing himself. Pedockie was convicted and appealed.

¶2 The court of appeals held that Pedockie voluntarily waived his right to counsel through his dilatory conduct. It nevertheless reversed his conviction, holding that the waiver was not knowing and intelligent. We affirm the reversal of Pedockie's conviction, but on different grounds. Like the court of appeals, we recognize that an accused may voluntarily waive his right to counsel through his conduct. But we find no such voluntary waiver in this case.

FACTUAL AND PROCEDURAL BACKGROUND

¶3 We recite the facts in a manner consistent with the jury's verdict. On January 3, 2001, Pedockie and his cousin kidnapped Nicole Sather, Pedockie's ex-girlfriend. When Sather attempted to escape from Pedockie's truck, Pedockie's cousin shot at her, and Pedockie restrained her. The next day, Pedockie threatened to kill Sather and himself. When Pedockie stopped for gas, Sather escaped with the help of a gas station employee. Pedockie was later arrested and charged with aggravated kidnapping, a first degree felony, in violation of Utah Code section 76-5-302.[1]

¶4 At Pedockie's initial appearance on February 20, 2001, the trial judge found Pedockie indigent and appointed the Weber County Public Defenders' Association ("PDA") to defend him. The judge also gave Pedockie a copy of the Information that had been filed and advised him of the charges against him and the potential penalties associated therewith. Pedockie requested disposition of his case according to the Speedy Trial Statute, which entitles a defendant who is imprisoned to be tried within 120 days of the request.[2] At a later hearing, the judge set Pedockie's jury trial for August 13, 2001.

¶5 On August 1, 2001, at the request of Pedockie's PDA attorney, who needed additional time to prepare, the trial judge continued the trial to December 10, 2001. The trial was subsequently continued to February 4, 2002, to accommodate a conflict in the prosecutor's schedule.

¶6 Scheduling conflicts, however, were not the only difficulties arising during pretrial proceedings. Difficulties between Pedockie and his attorneys were a recurring theme. Pedockie's first two PDA attorneys withdrew, through no fault of Pedockie, because one had a conflict of interest and the other lost his contract with the PDA. And less than a month before trial, Pedockie's third PDA attorney, James Retallick, also moved to withdraw.

¶7 Retallick informed the trial judge that Pedockie was insisting that he file four motions that Retallick believed were "absolutely frivolous." Although Retallick had explained to Pedockie why he could not in good faith file the motions, Pedockie nevertheless believed that Retallick was not

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[1] Utah Code Ann. § 76-5-302 (1999).

[2] Id.

representing his best interests and requested the appointment of a PDA attorney who would file them. The trial judge explained that Pedockie did not have a right to "pick and choose" an attorney from the PDA, stating, "I can appoint an attorney to work with you but if you don't want to accept his advice, you've either got to represent yourself or get your own attorney." Pedockie stated that he did not wish to proceed pro se and agreed to have Retallick continue the representation. The next day, however, Pedockie fired him.

¶8 A couple of weeks later, Pedockie requested that the judge release the PDA office because he had hired private attorney Ed Brass to represent him. Stating that Pedockie was entitled to legal representation, the trial judge granted his request and continued the trial to April 15, 2002, to give Brass time to prepare.

¶9 Three days before trial, Brass moved to withdraw as counsel, stating that he had an ethical conflict with Pedockie that made representation impossible. Brass was unwilling to stay on the case as standby counsel because he did not believe that Pedockie was "sophisticated enough to handle a first degree felony trial" without full-time counsel. The trial judge reluctantly granted Brass's motion to withdraw, stating, "I want Mr. Pedockie to understand, I'm not gonna continue this case again . . . . [Y]ou either get an attorney who will represent you on the matter or you're just gonna represent yourself next time it's scheduled."

¶10 On May 1, Pedockie appeared in court without an attorney and reported that he was still attempting to hire one. The judge continued the case until May 29 and again admonished Pedockie to get an attorney. But on May 29, Pedockie again appeared without counsel, explaining that he had been unable to find an attorney to file his motion for prosecutorial misconduct because "[e]verybody thinks it's unethical to bring."

¶11 The trial judge warned Pedockie that he was going to set the case for trial and that Pedockie would have to get an attorney or proceed without one. Pedockie emphasized the seriousness of his case, explaining that "you're talking about my life at stake." The prosecutor asked the judge to make a record Pedockie's "election to represent himself at the time of is voluntary and knowing." The judge responded that "the m is he doesn't want to represent himself. . . . But on ...er side, every time we give him an attorney or have him attorney, the attorney withdraws." When Pedockie that he wanted another attorney appointed who would

file his motions, the judge stated, "See, that's the problem. You need to start following the advice of the attorney that's representing you instead of you trying to tell him what to do."

¶12 After scheduling trial for September 30, 2002, the trial judge informed Pedockie that he could hire a private attorney, but warned him that the trial would not be continued again. The trial judge also appointed standby counsel, but clarified that Pedockie was still responsible for filing and arguing his own motions.

¶13 At a July 31 hearing, Pedockie announced that he had hired Paul Grant as his attorney but that Grant had indicated he was going to withdraw. Pedockie asked the judge to appoint primary counsel who could assist him in arguing his motions, and the judge chastised him for his unwillingness to follow the advice of his prior attorneys. But when Pedockie persisted, the trial judge relented:

> The Court: I can appoint the public defenders' office. I cannot pick and choose which attorney represents you. There are at least three people in that office that you've had, and now they no longer can represent you. So do you want the public defenders' office or not?
>
> Mr. Pedockie: As of right now, I'd like to-- I need a attorney--
>
> The Court: Okay.
>
> Mr. Pedockie: --Unless you're gonna--
>
> The Court: I'll appoint the public defenders' office for the third time then. Okay.

A hearing on Pedockie's motions was then set for August 12. Thereafter, the trial judge indicated that Pedockie needed to give a copy of his motions to the PDA attorney prior to the hearing, and the clerk suggested that they coordinate with the PDA to make sure August 12 was an acceptable date. All of this was consistent with the fact that the PDA had been appointed to act as Pedockie's primary, rather than standby, counsel.

¶14 Prison officials failed to transport Pedockie to the August 12 hearing. In Pedockie's absence, the trial judge

informed Martin Gravis, the PDA attorney who had been assigned to represent Pedockie following the July 31 hearing, that he "was not inclined to appoint a public defender" for Pedockie and that Gravis was there only in the capacity as standby counsel. The motion hearing was then rescheduled for the following day.

¶15 The next day, Pedockie expressed surprise and confusion when he learned that Gravis was acting only as standby counsel and would not argue the motions. Pedockie again requested that the court appoint an attorney to argue his motions, emphasizing their importance to his case and his desire to see them argued properly. The trial judge declined, indicating that he would not appoint an attorney because of Pedockie's insistence that his attorneys pursue unethical courses of action. The judge reiterated that, if Pedockie wanted an attorney, he would have to hire one himself.

¶16 During a hearing on August 21, the trial judge again scolded Pedockie, refused to appoint an attorney, and informed Pedockie that he must hire a private attorney or proceed pro se. He told Pedockie that his attorneys have "always asked to be recused because you want them to do something that's illegal that's a violation of the Canons of Ethics." Pedockie insisted that he could not afford a private attorney and that he was invoking his Sixth Amendment right to counsel.

¶17 At a September 18 pretrial conference, Pedockie failed to submit the jury instructions that his standby counsel had prepared and again requested that an attorney be appointed to represent him. The trial judge refused, stating that he had waived his right to counsel.

¶18 Pedockie's jury trial began on September 30, 2002. Pedockie again requested counsel, complaining that he was neither "educated nor familiar with the rules and proceedings" of the court and did not know how many juror challenges he had. The trial judge denied Pedockie's request, finding that Pedockie had knowingly and intelligently waived his right to an attorney. Pedockie then asked that standby counsel be excused from the case because the whole case was a "scam and a mockracy" and standby counsel was "just taking up the taxpayers' dollars." After explaining the benefits of having standby counsel who was trained in the law, the judge granted Pedockie's request, and Pedockie proceeded to represent himself.

¶19 The jury found Pedockie guilty of aggravated kidnapping, and he was sentenced. Pedockie appealed, arguing that he was deprived of his constitutional right to assistance of

counsel.[3] The court of appeals reversed Pedockie's conviction and remanded the case for a new trial.

¶20 The court of appeals first considered whether Pedockie's conduct evidenced a voluntary waiver of his right to counsel. Recognizing that a defendant's decision to waive counsel may be subject to constitutionally permissible constraints, the court of appeals reasoned that the trial judge reasonably required Pedockie to either accept representation by the PDA, hire private counsel, or proceed pro se. It therefore held that Pedockie had voluntarily waived his right to counsel through his conduct.

¶21 The court of appeals then considered whether Pedockie's waiver was knowing and intelligent. Because the trial judge had failed to conduct an on-the-record colloquy with Pedockie to inform him of the dangers and disadvantages of self-representation, the court of appeals was confronted with the question of whether the case involved "extraordinary circumstances" that would require a de novo review of the record. It concluded it need not decide that question because there was "nothing in the record to persuade [it] that [Pedockie's] waiver was knowing and intelligent."[4] It therefore reversed Pedockie's conviction and remanded the case for a new trial.

¶22 The State petitioned for certiorari, which we granted. We have jurisdiction pursuant to Utah Code section 78-2-2(3)(a).[5]

STANDARD OF REVIEW

¶23 "On certiorari, we review the decision of the court of appeals, not the decision of the trial court."[6] Whether Pedockie voluntarily, knowingly, and intelligently waived his right to counsel is a mixed question of law and fact.[7] While we review questions of law for correctness, a trial court's factual

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[3] State v. Pedockie, 2004 UT App 224, ¶ 1, 95 P.3d 1182.

[4] Id. ¶ 35.

[5] Utah Code Ann. § 78-2-2(3)(a) (2002).

[6] Bear River Mut. Ins. Co. v. Wall, 1999 UT 33, ¶ 4, 978 P.2d 460.

[7] State v. Heaton, 958 P.2d 911, 914 (Utah 1998).

findings may be reversed on appeal only if they are clearly erroneous.[8]

ANALYSIS

¶24 The State urges us to find that Pedockie waived his right to counsel through his dilatory conduct and that he did so knowingly and intelligently. Whether a defendant may waive his right to counsel through his conduct is an issue of first impression in this court. We therefore begin by addressing the substantive requirements for waiver of a defendant's right to counsel under the Sixth Amendment and the procedure to be followed by appellate courts when reviewing cases of alleged waiver.[9] With these substantive and procedural requirements in mind, we turn to the court of appeals' conclusion that Pedockie waived his right to counsel through his dilatory conduct but that the waiver was invalid because it was not knowing and intelligent.

I. THE RIGHT TO ASSISTANCE OF COUNSEL

¶25 The Sixth Amendment to the United States Constitution guarantees defendants the right to counsel in felony proceedings.[10] As the United States Supreme Court articulated in Powell v. Alabama, "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[11]

¶26 Defendants also have the right to waive their right to counsel. The United States Supreme Court in Faretta v. California[12] held that the Sixth Amendment implicitly guarantees criminal defendants the ability to waive their right to the assistance of counsel and proceed pro se. Before permitting a defendant to do so, however, a trial court should ensure that the

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[8] State v. Harmon, 910 P.2d 1196, 1199 (Utah 1995).

[9] State v. Pedockie, 2004 UT App 224, ¶ 30 n.5, 95 P.3d 1182 (noting that Pedockie did not preserve a state constitutional claim).

[10] U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

[11] 287 U.S. 45, 68-69 (1932).

[12] 422 U.S. 806, 818-32 (1975).

waiver is voluntary, knowing, and intelligent.[13] A defendant should "be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing."[14]

¶27 Courts have recognized three methods pursuant to which a defendant may give up his constitutional right to the assistance of counsel: waiver, forfeiture, and waiver by conduct.[15] We outline the elements of each.

A. True Waiver

¶28 True waiver is the most common method by which defendants forsake their right to counsel. True waiver typically occurs when a defendant affirmatively requests permission to proceed pro se.[16] In State v. Bakalov, we required that defendants "clearly and unequivocally" request self-representation in order to waive their right to counsel.[17]

¶29 When a defendant requests to proceed pro se, his waiver will be valid only if he acts knowingly and intelligently, being aware of the dangers inherent in self-representation.[18] The most reliable way for a trial court to determine whether a defendant is aware of the dangers and disadvantages of self-representation is to engage in a colloquy on the record. At times, however, we have found a waiver of the right to counsel absent a colloquy. For example, in State v. Frampton, we found that a defendant knowingly and intelligently waived his right to counsel when he affirmatively requested to proceed pro se despite the fact that the trial court had not engaged in a colloquy.[19] We reasoned that the defendant should have realized the "value of counsel"

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[13] See id. at 835.

[14] Id. (internal quotation marks omitted).

[15] See United States v. Goldberg, 67 F.3d 1092, 1099 (3d Cir. 1995).

[16] Id.

[17] 1999 UT 45, ¶ 16, 979 P.2d 799.

[18] Faretta, 422 U.S. at 835.

[19] 737 P.2d 183, 187-89 (Utah 1987).

because he was represented by counsel in a prior trial.[20] Additionally, we concluded that he must have realized the seriousness of the charges filed against him because the judge had appointed standby counsel over his objection[21] and the judge had explained the charges, including the maximum penalty associated therewith, in two prior trials involving the same charges.[22]

¶30 True waiver does not apply in this case because Pedockie never expressed a desire to represent himself. To the contrary, the record is replete with instances of Pedockie insisting that he "want[ed] adequate counsel" and that he was "not going to represent [himself]."

B. Forfeiture

¶31 While waiver is an intentional relinquishment of a known right, forfeiture occupies the opposite end of the spectrum. Unlike waiver, "forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right."[23]

¶32 In United States v. Goldberg, the United States Court of Appeals for the Third Circuit observed that a defendant may be deemed to have forfeited his right to counsel when he engages in "extremely dilatory conduct" or abusive behavior, such as physically assaulting counsel.[24] When circumstances are egregious enough to constitute forfeiture, a court need not determine whether a defendant understands the risks of self-representation or warn him that he will lose his right to counsel. But because of its drastic nature, a defendant must engage in extreme conduct before forfeiture may be imposed.[25] We find no basis for imposing forfeiture under the facts presented here.

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[20] Id. at 189.

[21] Id. at 189 n.19.

[22] Id. at 189.

[23] United States v. Goldberg, 67 F.3d 1092, 1100 (3d Cir. 1995).

[24] Id. at 1101.

[25] Id.

C. Waiver by Conduct

¶33 Waiver by conduct, often referred to as implied waiver, combines elements of both true waiver and forfeiture.[26] "Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed pro se and thus, as a waiver of the right to counsel."[27] The conduct required to give rise to an implied waiver does not have to be as extreme as that required for forfeiture. And unlike the situation in cases of true waiver, a defendant need not intend to relinquish the right to counsel.[28] But the defendant must have been warned that continuation of the unacceptable conduct will result in a waiver of the right to counsel. As is the case in a true waiver situation, the waiver also must be knowing and intelligent. In other words, the defendant must have also possessed an awareness of the dangers and disadvantages of self-representation at the time of the implied waiver.[29]

¶34 While the United States Supreme Court has never specifically addressed whether a defendant may waive the right to counsel through inappropriate conduct,[30] it has recognized that a defendant may lose the constitutional right to be present at trial because of such conduct.[31] In Illinois v. Allen, the trial court had warned the defendant that he would lose his right to be present at his trial because of his disruptive behavior, yet he continued "in a manner so disorderly, disruptive, and disrespectful of the court that his trial [could not] be carried on with him in the courtroom."[32] Consequently, he lost the constitutional right to be present, even though he did not affirmatively relinquish it.[33] Thus, Allen suggests that a

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[26] Id. at 1100-01.

[27] Id. at 1100.

[28] Id. at 1101.

[29] Id. at 1102.

[30] Id.

[31] Illinois v. Allen, 397 U.S. 337, 343 (1970).

[32] Id.

[33] Id.

defendant can lose constitutional rights because of his conduct so long as he is "aware of the consequences of his actions."[34]

¶35 In United States v. Weninger,[35] the United States Court of Appeals for the Tenth Circuit applied analogous analysis in holding that the defendant had waived his right to counsel by failing to secure an attorney for trial. The defendant was given ample time and was warned to obtain an attorney, but he strategically and stubbornly failed to do so.[36] The Tenth Circuit held that this dilatory conduct should be treated as a request to proceed pro se.[37]

¶36 In summary, before we will find an implied waiver of the right to counsel based on a defendant's conduct, two requirements must be satisfied. First, the implied waiver must be voluntary. Second, the waiver must have been made knowingly and intelligently.

¶37 For an implied waiver to be voluntary, the trial court must warn the defendant of the specific conduct that will give rise to the waiver of his right to counsel. In other words, when a trial court believes that a defendant's conduct is unacceptable and will result in a waiver of his right to counsel, the court must warn the defendant that continuation of the unacceptable conduct will be treated as an implied request to proceed pro se and, thus, as a waiver of the right to counsel.[38] This warning must be explicit so that a defendant clearly understands both the nature of the unacceptable conduct and the implications of any such future conduct.

¶38 For an implied waiver to be knowing and intelligent, the trial court must ensure that the defendant is cognizant of

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[34] Goldberg, 67 F.3d at 1101 (emphasis added).

[35] 624 F.2d 163, 166-67 (10th Cir. 1980).

[36] Id.; see also United States v. Bauer, 956 F.2d 693, 694 (7th Cir. 1992) (finding that the combination of the defendant's "ability to pay for counsel plus refusal to do so . . . waive[d] the right to counsel at trial").

[37] Weninger, 624 F.2d at 166-67; see also Goldberg, 67 F.3d at 1102-03 (refusing to find waiver by conduct because the court had not made the defendant aware of the risks of self-representation).

[38] Goldberg, 67 F.3d at 1100-03.

the dangers and disadvantages of self-representation. The court should explain the consequences of a decision to proceed pro se and, at a minimum, must

> ascertain that the defendant possesses the intelligence and capacity to understand and appreciate the consequences of the decision to represent himself, including the expectation that the defendant will comply with technical rules and the recognition that presenting a defense is not just a matter of telling one's story; and . . . ascertain that the defendant comprehends the nature of the charges and proceedings, the range of permissible punishments, and any additional facts essential to a broad understanding of the case.[39]

¶39 Trial courts generally evaluate a defendant's understanding and intelligence by conducting a colloquy on the record. In those cases where a defendant continues to insist on his right to counsel, it may seem awkward for a trial court to engage in a typical colloquy regarding the inherent dangers of self-representation. But we still strongly encourage trial courts to do so as a means to ensure that a defendant is aware of the disadvantages and dangers of self-representation.[40]

II. DETERMINING THE VALIDITY OF A WAIVER

¶40 While we have urged that trial courts engage in an on-the-record colloquy with defendants to ensure that they are aware of the dangers and disadvantages of self-representation, we have not imposed an absolute requirement that they do so. Rather, we have recognized that the validity of a defendant's waiver turns upon the particular facts and circumstances surrounding each case.

¶41 Relying on admittedly confusing language from some of our prior cases, the court of appeals stated that, in the absence of a colloquy, appellate courts are required to conduct a de novo

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[39] State v. Heaton, 958 P.2d 911, 918 (Utah 1998).

[40] See Trujillo v. State, 2 P.3d 567, 575 (Wyo. 2000) (explaining that a warning in a waiver by conduct situation "should be comparable in content to the warning given to a defendant who affirmatively asserts his right to self-representation").

review of the record to determine the validity of a defendant's waiver of the right to counsel only in "extraordinary circumstances." It then concluded that it need not evaluate Pedockie's case for such extraordinary circumstances because "there is simply nothing in the record to persuade us that [Pedockie's] waiver was knowing and intelligent."[41]

¶42 We take this opportunity to clarify our prior case law regarding appellate review in cases involving waiver of the right to counsel. As previously stated, before we will accept a defendant's waiver of his right to counsel, we have required that he be "aware of the dangers and disadvantages[] of self-representation,"[42] and we continue to strongly recommend a colloquy on the record as the preferred method of determining whether a defendant is aware of these risks. Indeed, a trial court generally cannot determine a defendant's understanding without engaging in the "penetrating questioning" found in a colloquy.[43] The sixteen-point colloquy found in State v. Frampton[44] establishes a sound framework for efficient and complete questioning. Moreover, on appeal, such a colloquy provides the reviewing court with "'an objective basis for review' upon the almost inevitable challenge to the waiver by the defendant who proceeds pro se and is subsequently convicted."[45]

¶43 In declining to review the record de novo, the court of appeals relied on State v. Heaton, where we held that a reviewing court could engage in de novo review only in "extraordinary circumstances."[46] But in two cases following Heaton, we found that de novo review was appropriate in the absence of a colloquy and never indicated that such a review was dependent on the

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[41] State v. Pedockie, 2004 UT App 224, ¶ 35, 95 P.3d 1182.

[42] State v. Frampton, 737 P.2d 183, 187 (Utah 1987) (internal quotation marks and citation omitted).

[43] Id.

[44] Id. at 187 n.12.

[45] Wayne R. LaFave et al., 3 Criminal Procedure § 11.5(c) (2d ed. 1999) (quoting People v. Sawyer, 438 N.E.2d 1133, 1138 (N.Y. 1982)); see also State v. Heaton, 958 P.2d 911, 918 (Utah 1998).

[46] 958 P.2d at 918.

existence of extraordinary circumstances.[47] We now clarify that it is not.

¶44 When this court stated in Heaton that a de novo review was appropriate only in extraordinary circumstances, we cited the Ninth Circuit case of Harding v. Lewis.[48] But the Harding court actually allowed for de novo review absent a colloquy; it only explained that a valid waiver absent a colloquy should "rarely" be found.[49] Our mistaken interpretation of Harding, combined with the fact that Heaton is inconsistent with this court's more recent decisions, suggests the need for us to rearticulate the procedure to be followed by reviewing courts when evaluating the validity of a defendant's waiver of the right to counsel in the absence of a colloquy.[50]

¶45 Absent a colloquy on the record, a reviewing court should review the record de novo to determine whether the defendant knowingly and intelligently waived his right to counsel. De novo review is appropriate because the validity of a waiver does not turn upon "whether the trial judge actually conducted the colloquy,"[51] but upon whether the defendant understood the consequences of waiver.[52] A de novo review allows a reviewing court to analyze the "particular facts and circumstances surrounding each case" to make that determination.[53] But we pause to note that, considering the strong presumption against waiver and the fundamental nature of the right to counsel, any doubts must be resolved in favor of the defendant. We therefore anticipate that reviewing courts will rarely find a valid waiver of the right to counsel absent a colloquy.

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[47] See State v. Hassan, 2004 UT 99, ¶ 22, 108 P.3d 695; State v. Arguelles, 2003 UT 1, ¶ 70, 63 P.3d 731.

[48] 834 F.2d 853, 857 (9th Cir. 1987).

[49] Id.

[50] See Hassan, 2004 UT 99, ¶ 22; Arguelles, 2003 UT 1, ¶ 70; State v. Frampton, 737 P.2d 183, 188 (Utah 1987).

[51] Hassan, 2004 UT 99, ¶ 22.

[52] Frampton, 737 P.2d at 188.

[53] Id.

III. PEDOCKIE'S CASE

¶46 We now turn to the particular facts of this case. This case is a prime example of the confusion and inconsistency that can permeate proceedings in the absence of an explicit warning and colloquy regarding the right to counsel. In the face of such confusion, we cannot find a voluntary, knowing, or intelligent waiver of Pedockie's right to counsel.

¶47 First, we conclude that Pedockie did not voluntarily waive his right to counsel through his conduct. While the trial judge repeatedly chastised Pedockie for his past unwillingness to follow counsel's advice, his statements with respect to Pedockie's right to appointed counsel were inconsistent and confusing.

¶48 For example, when Retallick moved to withdraw, the trial judge warned Pedockie that he would need to either accept Retallick's advice, represent himself, or get his own attorney. But after Pedockie fired Retallick, the trial judge ordered a continuance, stating that "you're entitled to have an attorney represent you, and, obviously, Mr. Brass . . . hasn't had enough time to get ready."

¶49 When Brass withdrew, the trial judge continued to scold Pedockie for prior delays and maintain that Pedockie would need to hire a private attorney or proceed pro se. Nevertheless, at the July 31 hearing, the trial judge agreed to "appoint the public defender's office for the third time" and gave every indication that the PDA attorney would act as primary, rather than standby, counsel. Pedockie relied on this statement when he failed to retain private counsel and appeared at the August 13 hearing expecting representation by the PDA. He was thus understandably confused when the judge insisted that the PDA attorney's role was limited to that of standby counsel. It is particularly troubling that, after agreeing to appoint counsel on July 31, the trial judge never warned Pedockie of the conduct that would give rise to an implied waiver of his right to appointed counsel but nevertheless imposed such a waiver sometime between the July 31 and August 13 hearings when Pedockie does not appear to have engaged in any objectionable conduct. Because any uncertainty over an alleged waiver of the right to counsel must be resolved in favor of an accused, we are unable to find a voluntary waiver under these circumstances.

¶50 Finally, even if Pedockie had voluntarily waived his right to counsel, our de novo review of the record fails to establish that any implied waiver was knowing and intelligent.

There is nothing in the record to indicate that, at the time of the alleged waiver, Pedockie appreciated "the consequences of the decision to represent himself, including the expectation that [he would need to] comply with technical rules and the recognition that presenting a defense is not just a matter of telling one's story."[54]

¶51 Although the record does contain evidence that Pedockie wanted his case to be tried by an attorney because he knew "nothing about the law" and was not familiar with the rules of the court, such general knowledge does not necessarily evidence an understanding of the technical requirements inherent in presenting one's case. While Pedockie arguably obtained some understanding of these technical requirements during the course of the proceedings, the record is devoid of evidence that Pedockie understood these requirements prior to the time of the alleged waiver. For instance, Pedockie was informed of the technical rules of the court when the judge appointed standby counsel and explained that standby counsel could help prepare jury instructions and cross-examine and subpoena witnesses for trial but would not argue Pedockie's motions. By this point, however, the trial judge had already ruled that Pedockie was not entitled to appointment of primary counsel. Therefore, any knowledge that Pedockie may have had regarding the dangers and disadvantages of self-representation was too little, too late.

CONCLUSION

¶52 We agree with the court of appeals that Pedockie is entitled to a new trial. We have reviewed the record and conclude that Pedockie did not voluntarily, knowingly, or intelligently waive his right to the assistance of counsel.

¶53 Chief Justice Durham, Associate Chief Justice Wilkins, Justice Durrant, and Justice Nehring concur in Justice Parrish's opinion.

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[54] State v. Heaton, 958 P.2d 911, 918 (Utah 1998).